

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND LLOYD GROGINS,

Defendant.

Case No. 2:19-cr-00009-APG-NJK

ORDER AND
REPORT AND RECOMMENDATION

(Docket No. 22)

This matter was referred to the undersigned Magistrate Judge on defendant Raymond

Lloyd Grogins' motion to suppress statements and evidence. Docket No. 22. The Court has

considered Defendant's motion and exhibit, the United States' response and exhibit, Defendant's

reply, and the evidence and arguments presented at an evidentiary hearing held before the Court.

Docket Nos. 22, 23, 24, 25, 26, 42.

I. BACKGROUND**A. Testimony of Sergeant Benjamins**

On October 8, 2018, at approximately 11:55 a.m., Henderson Police Department Sergeant

Felicia Benjamins responded to a priority dispatch call involving a gun at a residence in Henderson,

Nevada, due to the nature of the call. Docket No. 44 at 7. Sergeant Benjamins was not one of the

first responding officers and responded as a supervisor because it was a gun call. *Id.* at 12-13.

When Sergeant Benjamins arrived at the location, she observed that three individuals had been

removed from the trailer and were on the sidewalk in handcuffs with officers watching over them.

Id. at 13-14, 15. Sergeant Benjamins observed Defendant sitting on the curb in handcuffs

1 accompanied by Henderson Police Officer Smith. *Id.* at 8, 14, 15. Since Defendant was in
2 handcuffs, it was likely that he had been patted down and Sergeant Benjamins was not informed
3 whether any weapons were found on Defendant. *Id.* at 15. Sergeant Benjamins observed
4 additional officers down the street toward the residence. *Id.* at 7, 23. Sergeant Benjamins' role
5 was to observe and try to stabilize the situation. *Id.* at 7, 20. Sergeant Benjamins was also involved
6 in investigating the incident. *Id.* at 20.

7 Sergeant Benjamins approached Defendant, who was sitting on the curb in handcuffs
8 engaged in "a dialogue" with Officer Smith. *Id.* at 8. Sergeant Benjamins told Defendant that he
9 was not under arrest and was in handcuffs for his safety, officer safety, and the safety of the
10 community since the instant dispatch call was a gun call and officers were trying to make the scene
11 safe and decipher what had occurred. *Id.* Sergeant Benjamins told Defendant he was not in
12 custody at that time. *Id.* at 10, 11. Defendant was not free to leave during this time, however. *Id.*
13 at 22. During the time that Sergeant Benjamins was present, she observed Officer Smith speaking
14 to Defendant, though she did not know if it was just dialogue or interrogation; however, she never
15 heard Officer Smith give *Miranda* warnings to Defendant. *Id.* at 16-17.

16 Since the dispatch call stated that a white truck was involved in the incident, Sergeant
17 Benjamins asked Defendant if the white truck parked in front of the trailer belonged to him. *Id.* at
18 9, 17. Defendant responded that it was not his truck. *Id.* at 19. Sergeant Benjamins also asked
19 Defendant whose gun had been part of the incident and Defendant responded that the gun belonged
20 to his friend. *Id.* at 17-18, 19. Sergeant Benjamins asked Defendant if he knew where the gun
21 was and if the gun came into play during the incident. *Id.* at 19, 24-25. Defendant said that the
22 firearm was in the back of the truck and that it had been in a bag the entire time. *Id.* at 19-20, 24-
23 25. Sergeant Benjamins also asked Defendant if it was all right with him if she looked in the truck

1 because he had already said the firearm was there. *Id.* at 9. Sergeant Benjamins did not advise
2 Defendant of his *Miranda* rights prior to asking him questions. *Id.* at 19. Sergeant Benjamins
3 asked about the firearm for safety so it could be secured, though Defendant and the other two
4 possible suspects had already been secured at that time. *Id.* at 25-26.

5 Sergeant Benjamins walked over to the truck and saw that the gun was in the bed of the
6 truck. *Id.* at 19-20. Defendant was arrested for possessing brass knuckles that day but was not
7 arrested for any charge relating to the gun on October 8, 2018. *Id.* at 21-22.

8 **B. Testimony of Officer Smith**

9 On October 8, 2018, Henderson Police Department Police Officer Michael Smith was
10 dispatched to a family disturbance in Henderson, Nevada that he was told involved two males
11 arguing with each other and one of them brandishing a shotgun. *Id.* at 27-28, 39.¹ The dispatch
12 came about as a result of a 911 call reporting the disturbance. *Id.* at 37. Due to the nature of the
13 call, approximately six officers responded to the scene. *Id.* at 28. The call stated that the incident
14 included two white males and a white pickup truck. *Id.* at 29. The call described the male with a
15 firearm as a white male wearing a white hat and shirt; however, Defendant's hat was grey and his
16 shirt was not white. *Id.* at 40, 42.

17 When Officer Smith arrived on the scene, he parked at the entrance to the trailer park and
18 proceed, along with other officers, on foot toward the residence. *Id.* at 29. Outside of the
19 residence, Officer Smith observed the pickup truck, as well as two males and a female behind a
20 chain link fence. *Id.* As they approached, the officers' guns were drawn due to the nature of the
21

22 ¹ On direct examination, Officer Smith testified that the call stated two brothers were
23 involved in the incident. Docket No. 44 at 27-28. After refreshing his recollection with his report
on cross examination, however, Officer Smith testified that the call stated two males, not brothers,
were involved in the incident. *Id.* at 39.

1 call. *Id.* at 29, 43-44. Officer Smith issued commands to the three people to put their hands up
2 and walk toward him outside of the fence; all three complied with the commands. *Id.* at 29, 44.
3 As Defendant approached Officer Smith, while Officer Smith's weapon was pointed in his
4 direction, the officer told him to lift his shirt up and turn in a circle to determine that Defendant
5 had no weapons in his waistband, then to walk closer, turn around, and get on his knees. *Id.* at 29-
6 30, 45. Officer Smith saw no weapons on Defendant at that time. *Id.* at 45-46. When Defendant
7 reached Officer Smith, he immediately "took [Defendant] into custody" and put handcuffs on him.
8 *Id.* at 30, 46.

9 After assisting in taking the other two people – one of whom was Defendant's brother –
10 into custody, Officer Smith returned to Defendant. *Id.* at 30-31, 48. At this point, all three potential
11 suspects were in handcuffs and secure, and separated from each other. *Id.* at 48-49, 51. Officer
12 Smith, who was standing while Defendant sat on the curb, first asked Defendant why he thought
13 police were present at the scene, not where the shotgun was located. *Id.* at 51-52, 74, 80. Next,
14 Officer Smith asked Defendant if anyone else was in the trailer, and Defendant said no. *Id.* at 52.
15 Officer Smith then asked Defendant where the shotgun was. *Id.* Officer Smith asked Defendant
16 where the shotgun was six times before Defendant answered the question. *Id.* at 53. When
17 Defendant told the officer where the shotgun was and gave him permission to look for the gun in
18 the back of the truck, the officer told other officers, then continued questioning Defendant. *Id.* at
19 34, 54-55.

20 After the shotgun had been secured, Officer Smith continued questioning Defendant - he
21 asked Defendant his name, date of birth, social security number, where he lived, and what the fight
22 was about. *Id.* at 31, 55. Defendant responded to these questions and never refused to answer
23 them. *Id.* at 31, 51. Defendant told Officer Smith that he and his brother got into an argument that

1 morning and his brother wanted him to leave the house. Defendant did not want to walk down
2 Sunset or Boulder Highway with his backpack and shotgun, so he put the shotgun into his truck
3 before the officers arrived. *Id.* at 32. Defendant further told Officer Smith that the shotgun
4 belonged to his friend Showboat, who gave it to him to hold; that he never pointed the gun at
5 anyone; that the gun was not involved in the incident; and that he put it in the back of the pickup
6 truck. *Id.*

7 During this period, Officer Smith considered Defendant detained but not under arrest. *Id.*
8 at 33, 75. According to Officer Smith, family disturbances are inherently dangerous and adding a
9 firearm “brings it to a whole different level.” *Id.* at 33. When Officer Smith first contacted
10 Defendant, he patted him down for weapons, discovered brass knuckles in his pocket, and removed
11 them so that no one on the scene would have access to them. *Id.* at 33, 46. Therefore, for his
12 safety and the safety of the community, Officer Smith did not feel comfortable removing
13 Defendant’s handcuffs. *Id.* at 33.

14 While questioning Defendant, Officer Smith further asked if he had ever been arrested
15 before and Defendant responded that he had been arrested for assault with a deadly weapon in
16 California. *Id.* at 34, 56. Officer Smith also asked Defendant how long he had lived in Las Vegas
17 and whether he had registered as a felon in Las Vegas. *Id.* at 57. Throughout this questioning,
18 Officer Smith never read Defendant his *Miranda* rights. *Id.* at 55-56, 57. Defendant remained in
19 handcuffs and was not free to leave. *Id.* at 56.

20 Officer Smith was able to run a local records check on Defendant, but the national database
21 was not working that day, so he could not determine whether Defendant had a prior felony
22 conviction. *Id.* at 34-35. Nonetheless, Officer Smith arrested Defendant for possessing brass
23 knuckles and for felon in possession of a firearm. *Id.* at 35. Officer Smith had Defendant stand

1 up, conducted a complete search of Defendant, placed Defendant in the back of his patrol car, and
2 read Defendant his rights pursuant to *Miranda*. *Id.* at 35, 57-58. Defendant said that he understood
3 his rights and continued to talk to the officer. *Id.* at 35, 59. The *Miranda* rights were given
4 approximately 30 minutes after the shotgun was seized. *Id.* at 58-59. All of the information that
5 Officer Smith had to arrest Defendant for felon in possession of a firearm – that he was a convicted
6 felon who hadn't registered in Nevada and possessed a shotgun that day – came from Defendant's
7 pre-*Mirandized* statements. *Id.* at 60. After Officer Smith advised Defendant of his *Miranda*
8 rights, he asked him questions to elicit the same information that he had elicited from Defendant
9 prior to giving him his *Miranda* rights. *Id.* at 61.

10 Officer Smith transported Defendant to jail, where he discovered that the national database
11 was still down and he could not confirm Defendant's prior felony, so he transported Defendant
12 back to his residence and issued a citation for possession of brass knuckles. *Id.* at 36, 62. When
13 the database came back up and Officer Smith confirmed Defendant's prior felony, he drafted an
14 affidavit for a search warrant to arrest Defendant for convicted felon failing to register and
15 prohibited person in possession of a firearm. *Id.* at 63. Officer Smith never considered applying
16 for a search warrant because Defendant told him where the firearm was located and gave him
17 consent to go into the truck and recover it. *Id.*

18 **II. ANALYSIS**

19 **A. Credibility of Witnesses**

20 The Court ordered an evidentiary hearing in order to make an accurate determination of
21 what occurred in the instant case and how the facts relate to the applicable caselaw. "The
22 longstanding and repeated invocations in caselaw of the need of district courts to hear live
23 testimony so as to further the accuracy and integrity of the factfinding process are not mere

1 platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system.”
2 *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012). “[J]udges simply cannot decide
3 whether a witness is telling the truth on the basis of a paper record and must observe the witnesses’
4 demeanor to best ascertain their veracity - or lack thereof.” *Oshodi v. Holder*, 729 F.3d 883, 892
5 (9th Cir. 2013) (internal citation omitted). *See also United States v. Howell*, 231 F.3d 615, 621
6 (9th Cir. 2000) (evidentiary hearing required where defendant demonstrates that a significant
7 disputed factual issue exists); *United States v. Mejia*, 69 F.3d 309, 315 (9th Cir. 1995) (“There can
8 be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness’s
9 credibility”).

10 During the evidentiary hearing in this matter, the Court had the opportunity to listen to the
11 testimony of all witnesses, to observe and evaluate each witness’ demeanor while testifying, and
12 to weigh each witness’ credibility. Having done so, while the Court finds herein that the officers
13 made mistakes on the scene of the incident that impact the motion to suppress, the Court finds that
14 both Sergeant Benjamins and Officer Smith testified credibly and, in fact, were completely open
15 and honest throughout the evidentiary hearing.

16 **B. Motion to Suppress**

17 Defendant asks the Court to suppress his statements and the firearm recovered from the
18 truck. *See* Docket No. 22. In support of his request, Defendant submits that the officers engaged
19 in an illegal two-step protocol in violation of his *Miranda* rights, that his statements were
20 involuntary under the totality of the circumstances and obtained in violation of the Fifth
21 Amendment, and that the shotgun is fruit of the poisonous tree. *Id.* at 5-6. Defendant submits that
22 officers were required to advise him of his *Miranda* rights prior to his initial statements, as they
23 are the result of custodial interrogation. *Id.* at 6-9. Defendant further submits that the midstream

1 *Miranda* rights fail to cure this deficiency and, therefore, asks the Court to suppress all statements
2 made after the midstream *Miranda* rights. *Id.* at 10-12.

3 Defendant additionally submits that his statements were involuntary because he was
4 surrounded by officers who pointed guns at him, patted down and handcuffed, placed on a curb,
5 and interrogated by an officer standing over him without being informed of his right to remain
6 silent or his right to have counsel present. *Id.* at 14. Defendant submits that, when he did not
7 initially provide an answer to Officer Smith's question regarding the location of the shotgun,
8 Officer Smith repeated the question numerous times until he responded, indicating that compliance
9 was mandatory. *Id.* Further, Defendant submits that Officer Smith's tone, positioning over
10 Defendant and line of questioning was coercive and that Sergeant Benjamins' arrival and similar
11 line of questioning was also coercive. *Id.* Under the circumstances of the interrogation, Defendant
12 submits, his will was overborne and he responded to the questions in a manner that incriminated
13 himself. *Id.* at 14-15.

14 Finally, Defendant submits that the shotgun is fruit of the poisonous tree. *Id.* at 15.
15 Defendant submits that officers were able to locate the shotgun and charge him with possessing
16 due to his involuntary statements. *Id.* Therefore, Defendant asks the Court to suppress his
17 statements and the shotgun. *Id.* at 16.

18 In response, the United States submits that reasonable suspicion existed to detain
19 Defendant. Docket No. 24 at 4-7. Specifically, the United States submits that the circumstances
20 of the call allowed officers to detain Defendant until they could determine if the scene was safe.
21 *Id.* at 5-6. The United States next submits that Defendant "spontaneously uttered several

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1 statements" while initially detained without officers questioning him.² *Id.* at 7, 9. The United
 2 States further submits that, although Officer Smith became "stern" when Defendant initially did
 3 not respond to his questions about the gun, he was otherwise "pleasant and non-demanding." *Id.*
 4 at 8.

5 The United States submits that Defendant's statement was voluntary, as he spoke
 6 spontaneously to Officer Smith and later waived his *Miranda* rights. *Id.* The United States seems
 7 to argue, with no authority, that Defendant did not need to be Mirandized, as he had been arrested
 8 before and, therefore, "had knowledge of the system." *Id.* at 9. The United States analogizes the
 9 instant situation to one in which a suspect was found to have validly waived *Miranda* rights during
 10 custodial interrogation. *Id.* at 8-9. Finally, in response to Defendant's argument regarding the
 11 shotgun, the United States solely states, "Defendant's argument that the gun must be suppressed
 12 is not supported by case law and must be dismissed." *Id.* at 5. The United States cites to no
 13 caselaw at all and never returns to this topic. *See* Docket No. 24.

14 In reply, Defendant submits that he was clearly subjected to custodial interrogation.
 15 Docket No. 26 at 2-5. Defendant submits that the burden falls on the United States to demonstrate
 16 that his statement was voluntary and that the United States has failed to carry that burden. *Id.* at
 17 5. Defendant further submits that the post-*Miranda* statements are a result of an illegal two-step
 18 interrogation protocol in violation of his rights. *Id.* at 6-9. Additionally, Defendant submits that
 19 his statements were involuntary. *Id.* at 9. Finally, Defendant submits that the seizure of the
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22 ² The Court is troubled by this and other representations made by the Assistant United States
 23 Attorney assigned to the instant case. This representation is clearly not true, as demonstrated both
 by the bodycam of Officer Smith (which the AUSA had in her possession prior to writing her
 response) and by the credible testimony of both Sergeant Benjamins and Officer Smith.

1 shotgun constitutes fruit of the poisonous tree. *Id.* Defendant, therefore, asks the Court to suppress
2 his statements and the shotgun. *Id.* at 10.

3 **1. Pre-Miranda Statements**

4 Law enforcement personnel who wish to question individuals in their custody must first
5 afford them certain procedural rights. The most salient of these rights are the so-called “*Miranda*
6 warnings” - prior to questioning, an officer must tell a suspect “that he has the right to remain
7 silent and also the right to the presence of an attorney.” *Robertson v. Pichon*, 849 F.3d 1173, 1183
8 (9th Cir. 2017) (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). The *Miranda* warnings
9 are designed to secure a person's Fifth Amendment privilege against compelled self-incrimination.
10 The Supreme Court has reasoned that the privilege is protected when a person is adequately and
11 effectively advised of his or her rights. *See id.*; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). “In
12 order to combat [the pressures inherent in custodial interrogation] and to permit a full opportunity
13 to exercise the privilege against self-incrimination, the accused must be adequately and effectively
14 apprised of his rights.” *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006) (quoting
15 *Miranda*, 384 U.S. at 467).

16 The “touchstone” for *Miranda* warnings is whether the suspect was in custody when
17 interrogated. *United States v. Barnes*, 713 F.3d 1200, 1205 (9th Cir. 2013) (citing *Rhode Island*
18 *v. Innis*, 446 U.S. 291, 300 (1980)). To determine whether an individual was in custody, the Court
19 must examine the totality of the circumstances. *See Thompson v. Keohane*, 516 U.S. 99, 112
20 (1995). The test is whether “a reasonable innocent person in such circumstances would conclude
21 after brief questioning [that] he or she would not be free to leave.” *United States v. Bassignani*,
22 575 F.3d 879, 883-84 (9th Cir. 2009) (quoting *United States v. Booth*, 669 F.2d 1231, 1235 (9th
23 Cir. 1981)). A *Miranda* warning functions both to reduce the risk that an involuntary or coerced

1 statement will be admitted at trial and to implement the Fifth Amendment's self-incrimination
 2 clause. *Williams*, 435 F.3d at 1151. Thus, if a suspect in custody does not receive an adequate
 3 warning effectively apprising him of his rights before he incriminates himself, his statements may
 4 not be admitted as evidence against him. *Id.* at 1152. In determining whether a suspect was in
 5 custody, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom
 6 of movement' of the degree associated with formal arrest." *Stansbury v. California*, 511 U.S. 318,
 7 322 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

8 "[T]he term 'interrogation' under *Miranda* refers ... to any words or actions on the part of
 9 the police (other than those normally attendant to arrest and custody) that the police should know
 10 are reasonably likely to elicit an incriminating response from the suspect." *United States v.*
 11 *Williams*, 842 F.3d 1143, 1146-1147 (9th Cir. 2016) (internal citation omitted). Routine gathering
 12 of "background biological information, such as identity, age, and address, usually does not
 13 constitute interrogation." *United States v. Washington*, 462 F.3d 1124, 1132 (9th Cir. 2006). *See*
 14 *also Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (answers to questions regarding defendant's
 15 name, address, height, weight, eye color, date of birth, and current age were admissible in the
 16 absence of *Miranda* warnings); *United States v. Zapien*, 861 F.3d 971, 974-975 (9th Cir. 2017).
 17 Pre-*Miranda* questions about a person's identity "are not unconstitutional even if identification of
 18 the person may help lead to the prosecution of that person for a crime." *Id.* at 1133.

19 The determination of whether a defendant is in custody for purposes of the requirement to
 20 provide *Miranda* warnings is determined by examining the objective circumstances of the
 21 interrogation. *Stansbury*, 511 U.S. at 323. Because the Court is directed to examine the objective
 22 circumstances of the interrogation, the subjective views of either the suspect or the interrogating
 23 officer is not relevant to the determination of whether the defendant was in custody. *Id.* *See also*

1 *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997). The Ninth Circuit has identified five
2 factors relevant to the custody determination: “(1) the language used to summon the individual;
3 (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical
4 surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure
5 applied to detain the individual.” *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

6 Here, the Court finds that, under the *Kim* factors, Defendant was clearly in custody when
7 he was seated on the curb. Defendant was summoned from his location by police officers pointing
8 guns at him and yelling commands. When he complied with the commands and approached the
9 officers with his hands in the air, he was told to pull his shirt up, turn in a circle, turn his back to
10 officers, and get on his knees. Defendant was then patted down and handcuffed. Next, Defendant
11 was confronted with evidence of guilt – specifically, he was asked repeatedly by more than one
12 officer where the gun was, to whom it belonged, and whether he had possessed it. Further, he was
13 asked if he had a prior conviction and whether he had registered in Nevada. Third, the physical
14 surroundings of the interrogation were that Defendant was handcuffed and seated on a curb while
15 an armed officer – and, for a time, more than one - stood above him interrogating him. Fourth,
16 Defendant was detained for approximately 30 minutes. Finally, Defendant was physically
17 restrained while detained. The Court finds that a reasonable person, under these circumstances,
18 would not feel free to leave and, therefore, Defendant was in custody.

19 The Court further finds that Officer Smith’s questions to Defendant while he was
20 handcuffed on the curb extended far beyond background biographical information and constituted
21 interrogation. Among other questions, Officer Smith asked Defendant six times where the shotgun
22 was; he asked whose shotgun it was; he asked whether Defendant possessed the shotgun; he asked
23 for permission to recover the shotgun; he asked Defendant if he had been convicted of a felony;

1 and he asked Defendant if he had registered in Nevada as a felon. Additionally, Sergeant
 2 Benjamins asked Defendant if the white truck parked in front of the trailer belonged to him; whose
 3 gun had been part of the incident; whether he knew where the gun was; if the gun came into play
 4 during the incident; and if it was all right with him if she looked in the truck.

5 Based on the totality of the circumstances, the Court finds that Defendant was subjected to
 6 custodial interrogation. Defendant was not advised of his *Miranda* rights prior to this custodial
 7 interrogation.³ Therefore, the Court finds that Defendant's statements were improperly obtained.
 8 *Williams*, 435 F.3d at 1152 (if a suspect in custody does not receive an adequate warning
 9 effectively apprising him of his rights before he incriminates himself, his statements may not be
 10 admitted as evidence against him).⁴

11 **2. Post-*Miranda* Statements**

12 “[W]here law enforcement officers deliberately employ a two-step interrogation to obtain
 13 a confession and where separations of time and circumstance and additional curative warnings are
 14 absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court
 15

16³ Though not argued in briefing, the United States submitted at the evidentiary hearing that
 17 the questions fell under the “public safety” exception to *Miranda* warnings. *See New York v. Quarles*, 467 U.S. 649 (1984). This exception covers situations in which “there was an objectively
 18 reasonable need to protect the police or the public from any immediate danger.” *Williams*, 842 F.3d at 1149 (quoting *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994)). The exception
 19 allows an officer to ask “narrowly tailored question[s] that constitute] a reasonable attempt by [the] police
 20 officer to insure his personal safety.” *Carrillo*, 16 F.3d at 1050. The facts, as determined
 21 by the officers’ testimony in the evidentiary hearing, clearly establish that the pre-*Miranda*
 22 questions asked were not narrowly tailored to personal safety; therefore, this argument fails.

23⁴ “[A] statement is involuntary when the suspect’s will was overborne in such a way as to
 24 render his confession the product of coercion.” *United States v. Latz*, 162 Fed.Appx. 113, 118 (3d Cir. 2005) (quoting *Lam v. Kelchner*, 304 F.3d 256, 264 (3d Cir.2002)) (quotations omitted).
 25 Under the totality of the circumstances, the Court finds that the United States has failed to
 26 demonstrate that Defendant’s statements were voluntary.

1 should suppress the confession.” *Williams*, 435 F.3d at 1158 (citing *Missouri v. Seibert*, 542 U.S.
2 600 (2004)) (emphasis removed). Specifically, “[a] two-step interrogation involves eliciting an
3 unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda*
4 rights, and then eliciting a repeated confession.” *United States v. Narvaez-Gomez*, 489 F.3d 970,
5 973–74 (9th Cir. 2007).

6 In *Seibert*, the Court found that midstream *Miranda* warnings have inherent issues. For
7 example, “telling a suspect that ‘anything you say can and will be used against you,’ without
8 expressly excepting the statement just given, could lead to an entirely reasonable inference that
9 what he has just said will be used, with subsequent silence being of no avail.” *Seibert*, 542 U.S.
10 at 613. Thus, the Court found, “when *Miranda* warnings are inserted in the midst of coordinated
11 and continuing interrogation, they are likely to mislead and ‘depriv[e] a defendant of knowledge
12 essential to his ability to understand the nature of his rights and the consequences of abandoning
13 them.’” *Id.* at 613-614 (citing *Moran v. Burbine*, 475 U.S. 412, 424 (1986)). The Court further
14 found that “it would ordinarily be unrealistic to treat two spates of integrated and proximately
15 conducted questioning as independent interrogations subject to independent evaluation simply
16 because *Miranda* warnings formally punctuate them in the middle.” *Id.* at 614.

17 The *Seibert* Court instructs that a series of facts are relevant in determining whether
18 midstream *Miranda* warnings remedy the failure to warn prior to a first confession: “the
19 completeness and detail of the questions and answers in the first round of interrogation, the
20 overlapping content of the two statements, the timing and setting of the first and the second, the
21 continuity of police personnel, and the degree to which the interrogator’s questions treated the
22 second round as continuous with the first.” *Id.* at 615.

1 Here, the first round of interrogation consisted of complete and detailed questions and
2 answers. Officer Smith and Sergeant Benjamins asked Defendant numerous questions that
3 covered all aspects of the crimes with which Defendant was charged, including the location of the
4 gun, whether Defendant possessed it, whether Defendant owned it, whether it was “in play” during
5 the argument, whether Defendant has a prior conviction, and whether Defendant registered in
6 Nevada. In addition, the second interrogation consisted solely of Officer Smith re-asking the same
7 questions he and Sergeant Benjamins asked during the first interrogation. Therefore, police
8 continuity occurred and the two statements clearly overlapped. Further, the Court finds there was
9 no change of scenery between the first and second interrogations. Rather, the second interrogation
10 occurred at the same area as the first – only inside Officer Smith’s car rather than sitting on the
11 curb outside – within 30 minutes of the first interrogation. Finally, the second interrogation
12 appears to be a continuation of the first. Therefore, under *Siebert*, the *Miranda* warnings given
13 midstream do not cure the lack of *Miranda* warnings prior to Defendant’s initial custodial
14 interrogation, and the Court finds that the statements in the second interrogation were improperly
15 obtained.

3. Seizure of Firearm

17 The Court has already found that Defendant's statements were improperly obtained and
18 the officers found the gun based on Defendant's statement regarding its location and permission
19 to search the truck. The United States has failed to raise any argument as to how the gun may fall
20 within any exceptions to the exclusionary rule.⁵ “[J]udges [are not required] to anticipate and join

22 |⁵ The United States, in fact, failed to make any argument regarding the requested suppression
23 | of the gun or cite to any authority whatsoever. The United States' entire discussion regarding the
| requested suppression of the gun amounts to one sentence. *See* Docket No. 24 at 5.

1 arguments that are never raised by the parties. *See United States v. Griffiths*, 47 F.3d 74, 77 (2d
 2 Cir. 1995). Instead courts rely on the litigants not only to cite relevant precedents, but also to
 3 frame the issues for decision.” *United States v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010).
 4 Therefore, the Court finds that the United States waived any arguments regarding the
 5 inapplicability of the exclusionary rule. *See Kiessling v. Rader*, 2018 WL 1401972, at *3 (D. Nev.
 6 Mar. 20, 2018) (“The appropriate time to raise these additional arguments has passed as
 7 Defendants should have raised these arguments before Judge Koppe”); *see also Kor Media Grp.,*
 8 *LLC v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev. 2013) (courts only consider meaningfully-
 9 developed arguments).

10 As the United States has presented no meaningful argument in response to Defendant’s
 11 request for suppression of the gun, the Court finds that the gun was improperly seized as fruit of
 12 the poisonous tree. *See United States v. Rose*, 189 F.Supp.3d 528, 544-546 (D.V.I. 2016).

13 **III. RECOMMENDATION**

14 Based on the foregoing and good cause appearing therefore,

15 IT IS RECOMMENDED that Defendant’s motion to suppress evidence, Docket No. 22,

16 be **GRANTED**.

17 DATED: November 1, 2019.

18 
 19 NANCY J. KOPPE
 20 UNITED STATES MAGISTRATE JUDGE

21 **NOTICE**

22 This report and recommendation is submitted to the United States District Judge
 23 assigned to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and

1 recommendation must file a written objection supported by points and authorities within fourteen
2 days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file
3 a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951
4 F.2d 1153, 1157 (9th Cir. 1991).

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